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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1992. Pet. App. 1a. Timely petitions for rehearing were denied on June 16, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the May 6, 1992, judgment of the court of appeals.

STATEMENT

1. *Factual Background.* In the early 1980s, the long-time shortage of natural gas rapidly changed into a severe glut. As a result, in July 1983, respondent Natural Gas Pipeline Company of America (Natural), an interstate pipeline, reduced its purchases of high-priced gas from petitioner Colorado Interstate Gas (CIG), another

interstate pipeline. Although the contract between CIG and Natural had minimum purchase provisions, those provisions—and all similar provisions in pipeline contracts throughout the industry—were expressly declared unlawful by the Federal Energy Regulatory Commission (FERC), for the specific purpose of freeing customers like Natural to choose their suppliers. FERC set the rates Natural was to continue paying CIG for gas not purchased (to cover certain fixed costs), and Natural agreed to continue paying those rates to CIG.[1]

Some time after July 1983, CIG stopped *its* purchases of certain high-priced gas from Champlin Petroleum Company in western Wyoming. Subsequently, Champlin began selling that gas to Natural. To transport the gas out of Wyoming to the midwest, Natural purchased transportation services on a newly constructed "system" consisting of three independent pipelines laid end-to-end—the so-called "Trailblazer System." Each of the three pipelines had its own FERC-approved rates and entered into its own contracts; the middle pipeline, the WIC Pipeline, was wholly owned by CIG; the eastern pipeline, the Trailblazer Pipeline, was one-third owned by Natural's subsidiary, respondent NGPL-Trailblazer.[2]

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[1] FERC orders specifically concerned with the CIG-Natural contract may be found at 27 FERC (CCH) ¶ 61,315 (1984), 29 FERC (CCH) ¶ 61,124 (1984), and 30 FERC (CCH) ¶ 61,073 (1985). The Tenth Circuit affirmed in *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803 (1986), *cert. denied*, 479 U.S. 1043 (1987). The industry-wide order may be found at *Order No. 380*, FERC Stats. & Regs. (CCH) ¶ 30,571 (1984). The D.C. Circuit affirmed in *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (1985), *cert. denied*, 476 U.S. 1114 (1986).

[2] Pursuant to Rule 29.1 of the Rules of this Court, respondents state that NGPL-Trailblazer, Inc., has no non-wholly owned subsidiaries and is wholly owned by Natural Gas Pipeline Company of America, which itself has no non-wholly owned subsidiaries. All of Natural's stock is owned by MidCon Corp., which is wholly owned by Occidental Petroleum Corporation.

2. *District Court Proceedings.* In April 1984, CIG brought suit against respondents in the United States District Court for the District of Wyoming. First, despite FERC's invalidation of the minimum-purchase provisions of the CIG-Natural contract, CIG alleged that Natural breached the contract when it reduced its purchases. Second, CIG alleged a violation of the Sherman Act based on the same conduct, claiming that Natural had attempted to monopolize a market consisting of long-distance transportation of gas out of Wyoming. In particular, CIG argued that, by exercising its contract right to reserve capacity on the CIG pipeline, Natural had tried to confer a monopoly on the "Trailblazer System" (thus necessarily including CIG's portion, the WIC Pipeline). Third, CIG asserted that Natural was liable under Section 766A of the *Restatement (Second) of Torts* for tortiously interfering with CIG's contract with Champlin. Specifically, CIG claimed that Natural, by curtailing its purchases from CIG, had made CIG's performance of *its* contract with Champlin "more expensive or burdensome" (§ 766A) by allegedly depriving CIG of a buyer for the gas CIG had been buying from Champlin.

The jury returned a verdict for CIG on all three claims. The district court rejected Natural's legal challenges to the verdict. *See Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 661 F. Supp. 1448 (D. Wyo. 1987), *rev'd in part and aff'd in part*, 885 F.2d 683 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990). The district court did, however, adjust the damages award. In particular, one element of damages was found by the jury both on the tort claim and on the antitrust claim—$15,204,555 in "demand charge" damages.[3] Because antitrust damages are *trebled*, CIG asked the district court to eliminate the duplication by "subtract[ing] . . . the

[3] CIG had agreed to pay certain "demand charges" to reserve capacity in two facilities in Wyoming for transporting the Champlin gas out of the region. CIG claimed that the facilities became useless to it when Natural reduced its purchases and CIG stopped taking Champlin gas.

demand charge payments from the tortious interference award," and the district court did so, including them only as antitrust damages. CIG's Brief on First Appeal at 16 (citing Doc. 578, Judgment of Nov. 10, 1986); *see* Pet. App. 5a, 48a, 51a-52a. The court also remitted a portion of the remaining tort damages.[4] As a result, the total award to CIG was for $412,237,972, of which $8,008,839 were tort damages. *See* 661 F. Supp. at 1479; 885 F.2d at 691 n.12; Pet. App. 5a n.1, 44a-45a, 48a.

3. *The 1989 Court of Appeals' Judgment.* On Natural's appeal, the Tenth Circuit reversed the breach-of-contract award as preempted (885 F.2d at 686-90) but affirmed the tort award (*id.* at 690-91), which it noted was for $8,00[8],839 (*id.* at 691 n.12). The court also reversed the antitrust award (*id.* at 691-97), holding that there was insufficient proof of a critical element of attempted monopolization, namely, a dangerous probability of success. On this issue, the court noted that CIG's claim was "unusual" because it alleged, not that Natural was seeking a monopoly for itself, but that Natural was trying to confer a monopoly on the "System," which was not even a single economic actor. 855 F.2d at 692. The court concluded that, in the unique circumstances of this case (not "typical," *id.* at 694), there was "no room for speculation" about the possibility of monopoly power: here, the "dangerous probability" question came down to whether actual monopoly power had already been achieved, and it had not. *Id.* at 695.

Thus, the court explained that the only tool Natural had for affecting the market—its right to reserve capacity under the CIG-Natural contract and thereby tie up some of CIG's pipeline—was inherently limited and had been fully exhausted: Natural had already done all that it

[4] These damages consisted of $24,026,517 for restitution of transportation profits allegedly made by the Trailblazer Pipeline (the eastern pipeline in the "System"). The court awarded only one-third of that amount because only one-third of the Trailblazer Pipeline was owned by NGPL-Trailblazer. *See* Pet. App. 5a n.1, 44a.

could conceivably do and therefore could confer no greater market power on the "Trailblazer System" than it had already done.[5] And it was clear that the "System" was not shown (or found by the jury) to have monopoly power—the ability to exclude competition and raise prices. In particular, CIG failed to prove how much of its capacity was tied up or, therefore, that it was actually excluded from the market; indeed, the evidence suggested the opposite. 885 F.2d at 693, 694 n.19, 696 n.25.[6] Similarly, there was no proof of supracompetitive prices for transportation on the "System"; indeed, the court observed that such transportation was "inexpensive." 885 F.2d at 693.[7]

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[5] The court observed that "Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers" and that Natural had "exercis[ed] *all* its rights under the [contract] to tie up the *entire capacity it had reserved.*" 885 F.2d at 695. Therefore, the court explained, Natural could not shift any more market share it had already shifted, and if the "System" did not yet have market power, there was no danger of its acquiring any. "The necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly." *Ibid.*

[6] The court noted that, while Natural's actions tied up "a certain amount of space" in CIG's pipeline, CIG, which never asked FERC to eliminate Natural's reservation of rights, simply did not prove how much capacity it had left. 885 F.2d at 694 n.19. The court also observed that CIG was clearly able to offer capacity at least on an "interruptible" basis (*id.* at 693) and that CIG enjoyed "record profitability during Natural's tie-up" (*id.* at 696 n.25).

[7] The only statement made by the Tenth Circuit about prices on the "Trailblazer System" was that transportation along that route was "inexpensive." 885 F.2d at 693. Although CIG in its petition quotes from a sentence that uses the term "supracompetitive prices" (Pet. 9, 14), that sentence, as the Solicitor General explained in his *amicus* brief on CIG's previous petition, "does not refer to any evidence of supracompetitive pricing" and does not say that System prices were supracompetitive, but merely makes the "even if" assertion that "the duration of any ability to charge supracompetitive prices would be limited" (89-1508 U.S. Br. 17). We note, too, as

Having reversed the antitrust award, which included the demand-charge damages, the court of appeals had no occasion to address Natural's specific challenges to those damages (*see* Natural's Brief at 33, 46-47), which, as noted, the court understood not to be part of the tort award before it. CIG, while disputing Natural's claim that these damages were "speculative" (CIG Brief at 94 n.105), simply never presented to the court of appeals, even as an alternative ground for partial affirmance, any argument that the demand-charge damages should be reinstated in the tort award if liability on the antitrust claim were reversed. Omission of such an argument, whether or not deliberate, served a familiar tactical interest: keeping the tort award "low" ($8 million rather than $23 million) might make the antitrust and contract claims look like the only opportunities for giving "something" to CIG. Even after the Tenth Circuit's decision, CIG did not ask the court to reinstate the demand-charge damages in the tort award (which would have required the court to consider Natural's objections to those damages). Instead, CIG filed a rehearing petition only on the contract and antitrust claims, which the court denied.

The Tenth Circuit's judgment was by its terms final, with (as the court of appeals later said) "only the ministerial function remaining [for the district court] of entry of a corrected judgment therefor." Pet. App. 9a. The court held that judgment should be entered for Natural on the contract and antitrust claims and (as the court later said) "affirmed the tortious interference part of the district court's decision and judgment" for CIG on the tort claim. *Ibid.* (citing 885 F.2d at 697). The mandate remanded the case only for the district court

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the Solicitor General did on the previous certiorari petition, that CIG's repeated reliance for its factual claims on the opinion of the district judge (*e.g.*, Pet. 5, 6, 8) is clearly inappropriate, because the judge "was not the trier of fact" (89-1508 U.S. Br. 17 n.19).

"to enter judgment" in accordance with the opinion. Pet. App. 4a (quoting mandate).

CIG subsequently sought certiorari, raising the contract claim and the identical antitrust question CIG has included in the present petition. *See* 89-1508 Pet. i. The Court solicited the views of the United States, which explained that the case was highly unusual in its facts and that the decision of the Tenth Circuit was correct and did not warrant further review. 89-1508 U.S. Br. 11-20. This Court denied CIG's certiorari petition without dissent. 111 S. Ct. 441 (1990).

4. *Motions to Depart from the Appellate Mandate.* Before the district court entered the final judgment as directed by the Tenth Circuit's mandate, CIG filed a motion asking for "reinstatement" of the demand-charge damages ($15,204,555) in the final tort award. Pet. App. 50a. Natural disputed the propriety of the demand-charge damages on several grounds. Natural also filed a motion seeking a tort judgment in *its* favor based on a new decision of the Wyoming Supreme Court, rendered one week *after* the Tenth Circuit denied CIG's rehearing petition and issued its mandate, declaring that Wyoming law did not recognize *Restatement* § 766A, the basis of CIG's tort claim.[8] The district court rejected Natural's arguments, concluding that choice-of-law principles re-

[8] In *Price v. Sorrell*, 784 P.2d 614 (1989), the Wyoming Supreme Court said: "we . . . decline to adopt § 766A even though we have previously embraced §§ 766 and 766B." 784 P.2d at 615. The court specifically rejected the conclusion of the district court in this case that Wyoming would recognize § 766A (*id.* at 616): "the Federal District Court for the District of Wyoming has predicted that Wyoming would recognize a cause of action under the Restatement, Second, Torts § 766A (1979), since we have already embraced §§ 766 and 766B as noted above. *Colorado Interstate Gas v. Natural Gas Pipeline Co. of America*, 661 F. Supp. 1448, 1469 (D. Wyo. 1987). While we were persuaded that §§ 766 and 766B offered legal theories that enhanced Wyoming jurisprudence, we are not so persuaded with regard to § 766A."

quired application of Colorado rather than Wyoming law and upholding the demand-charge damages. Pet. App. 45a-48a. But the court granted CIG's motion and entered judgment for CIG in the amount of $23,213,394 plus interest, solely on the tort claim. *Id.* at 52a-53a.

5. *The 1992 Court of Appeals' Judgment.* Natural appealed the new judgment, challenging the district court's choice-of-law and demand-charge rulings. Pet. App. 8a. CIG did not take any cross-appeal from the district court's judgment or otherwise raise, mention, or preserve any antitrust claim. The Tenth Circuit vacated the district court decision, holding that the district court had erred in failing to enter judgment on the tort claim for $8,008,839 plus interest in accordance with the mandate on the 1989 appeal. *Id.* at 8a-14a.

As to CIG's claim for the additional demand-charge damages, the court observed that "the tort award appealed to this court [in the first appeal] totalled $8,008,839" (Pet. App. 5a n.1) and that "the propriety of awarding the demand charge payments as tort damages" was not before the court in the first appeal (*id.* at 11a (internal quotation marks omitted)). The court then pointed out that its ruling in the first appeal rendered the $8 million tort award final. The court explained that it had "affirmed" that award and "remanded with instructions 'to enter judgment in accordance with the opinion,'" rendering "the tort portion of the district court's original judgment . . . final, with only the ministerial function remaining of entry of a corrected judgment therefor." *Id.* at 9a (quoting mandate). After noting that "CIG could have, but did not, seek rehearing or to have this court recall its mandate for any correction it thought was necessary" (*id.* at 9a n.3), the court reasoned that, as a consequence of the affirmance, CIG's claim for reinstatement of the demand-charge damages in the district court could only have been seeking relief from a final judgment under Rule 60(b)(6). Pet. App. 9a-10a. But,

the court ruled, "on the facts before us, we must conclude that the relief sought by CIG—a change in the content of the judgment affirmed by this court—is unsupported by an extraordinary reason to justify relief." *Id.* at 10a. The court observed, citing obvious "concerns of finality" (*ibid.*), that the district court was obliged to comply strictly with the mandate directing it "to enter judgment on the tort award" and that CIG simply was not entitled to "a second appeal . . . to challenge the affirmed tort award." *Id.* at 11a.[9]

REASONS FOR DENYING THE PETITION

CIG presents two questions for review. The first question, which is word-for-word the same antitrust question CIG presented to this Court after the first appeal, is not properly presented on this appeal and, in any event, is no more worthy of certiorari now than it was two years ago. The second question, which challenges the Tenth Circuit's refusal to permit the district court to add damages to the tort award affirmed on the first appeal, is based on a series of patent mischaracterizations of the opinion below. What the Tenth Circuit actually held is plainly correct and not in conflict with any decisions of this Court or of any other court. Further review should be denied, and the case finally brought to a close.

1. *The Antitrust Question.* For the second time, CIG seeks review of the Tenth Circuit's 1989 antitrust ruling. This challenge must be rejected for at least three reasons. First, CIG is necessarily challenging the Tenth Circuit's

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[9] For similar finality reasons, the Tenth Circuit also held that the district court was not entitled to consider Natural's claim for a tort judgment in its favor. Pet. App. 12a-14a. The court concluded that no different result was justified by the fact that Natural's contention, unlike CIG's claim for the demand-charge damages, was unavailable on the first appeal because it was based on subsequent events—a clear change in law after denial of rehearing on the first appeal.

1989 judgment, but because that was a final judgment, it could be challenged only at that time and cannot (again) be presented for review three years later. Second, CIG cannot seeek review of the Tenth Circuit's *1992 judgment* on antitrust grounds because that judgment includes no antitrust ruling and, indeed, because CIG raised no antitrust argument to the Tenth Circuit in the 1992 appeal. Third, even if the antitrust question were properly presented, this Court has already correctly deemed the Tenth Circuit's antitrust ruling unworthy of further review, and the pendency of *Spectrum Sports, Inc. v. McQuillan*, No. 91-10, in no way alters that conclusion.

a. CIG's antitrust claim is out of time. By its terms, this claim challenges the judgment of the court of appeals in the first appeal, which was entered in 1989. CIG's current petition on this question is well outside the 90-day period (plus up to 60 days' extension) allowed for review of a court of appeals judgment. 28 U.S.C. § 2101(c).

The 1989 judgment, on its face and as the Tenth Circuit later explained (*see* pages 6-8, *supra*), was a *final* judgment fully resolving the case, "so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed." *Department of Banking v. Pink*, 317 U.S. 264, 267 (1942); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 3.8, at 122 (6th ed. 1986). And it is settled that "[w]here the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order." *Pink*, 317 U.S. at 268; *Cole v. Violette*, 319 U.S. 581 (1943); *see FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984); Stern, Gressman, & Shapiro, *supra*, § 3.10, at 133.[10] The Tenth Circuit's 1989 ruling

[10] Indeed, even if further non-ministerial proceedings had been contemplated on the separate state-law tort claim—which they were

was in no conceivable sense interlocutory—which is the precondition to postponing review of certain rulings until they become part of a later final judgment, as the Court must do in state-court cases (28 U.S.C. § 1257; Stern, Gressman, & Shapiro, *supra*, § 3.7 *et seq.*) and as it ordinarily does as well in federal-court cases (*see Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); Stern, Gressman, & Shapiro, *supra*, §§ 2.2, 4.18, at 41, 224). Thus, the time for review of the 1989 judgment ran from the date of that judgment, and had long since expired when CIG filed its current petition three years later.

Any other rule would wreak havoc with the judicial system's and litigants' strong interests in finality. If a litigant like CIG could challenge a final court of appeals disposition of the case long after the time allowed under 28 U.S.C. § 2201—and could do so even after unsuccessfully petitioning once—the case would never be over. Any litigant could repeatedly challenge a final court of appeals judgment by the simple expedient of filing a motion for relief from the judgment (*see* Fed. R. Civ. P. 60(b)) and then reraising its already-resolved claims on appellate and certiorari review. Such a use of post-judgment motions would destroy the finality guaranteed by the time limits for review.

In a footnote, CIG cites a number of decisions to support the assertion that "issues raised upon a previous appeal may be subject to review before this Court after a subsequent appeal." Pet. 12 n.6. But those decisions are inapt, and the principle asserted incorrect as stated. The cited cases stand for nothing more than the proposition that "the Court on certiorari to review a final decree can reach back and correct errors in the *interlocu-*

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not—the 1989 court of appeals judgment would still be final on the antitrust claim. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 309 n.3 (1987); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

tory proceedings below, even though no attempt was made to secure review of the *interlocutory* decree or even though such an attempt was made without success." Stern, Gressman, & Shapiro *supra*, § 2.2, at 41 (emphasis added). Thus, every case cited by CIG involved a first appellate ruling that was by its terms interlocutory: in every such case, further substantive trial-court proceedings (*e.g.*, to assess damages) were specifically contemplated by the first appellate court ruling (*e.g.*, permitting liability). The first ruling therefore could be challenged (only) on review of the later final judgment.[11] In the present case, by contrast, the judgment on the first appeal was final, not interlocutory, and therefore had to be challenged (as it was) at the time it was rendered.

b. To the extent that CIG's antitrust challenge seeks review of the 1992 court of appeals' ruling, the effort must fail for a separate (though related) reason. The Tenth Circuit's 1992 judgment involved an appeal from the district court's 1990 judgment, which by its terms awarded relief only on the tort claim. Pet. App. 52a-53a. Indeed, the district court (following CIG's own motion) cited Fed. R. Civ. P. 54's provision for partial judgments in entering the judgment on only one of the claims in the case. *Id.* at 42a, 48a, 52a. CIG's antitrust claim thus was not involved in, and hence cannot be presented on review of, the Tenth Circuit's 1992 ruling on appeal from that judgment.[12]

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[11] Indeed, in every such case, the very same claim or cause of action was presented on the second appeal after the non-ministerial remand, so that the threshold issues resolved in the first appeal were necessarily part of the final ruling on the second appeal.

[12] We note in this regard that, on July 15, 1992, the district court carried out the mandate of the Tenth Circuit's 1992 judgment and entered a new final judgment explicitly ruling in favor of Natural on the antitrust claim (as well as the contract claim). The 30-day time for appeal (28 U.S.C. § 2107) has run, and CIG has not taken an appeal.

Moreover, if the 1990 district court judgment is somehow read as implicitly rejecting the antitrust claim, then CIG was plainly obliged to challenge that rejection by appeal or cross-appeal to the Tenth Circuit before it could pursue the issue here. *See* Stern, Gressman, & Shapiro, *supra*, § 6.35, at 382. Yet CIG took no such appeal; indeed, CIG made no attempt whatever to preserve its antitrust claim in the Tenth Circuit on the second appeal —even after this Court granted the petition in *Spectrum Sports* on March 30, 1992 (112 S. Ct. 1557), more than one month prior to the Tenth Circuit decision. In short, because this claim was neither raised in nor considered by the Tenth Circuit on the appeal resulting in the 1992 ruling, it is not properly presented on review of that ruling in this Court. *See* Stern, Gressman, & Shapiro, *supra*, § 6.26, at 364.

c. Even if it were properly presented, the antitrust question is not worthy of certiorari review. This precise question was fully considered by this Court in 1990, and the Court denied certiorari without dissent. The reasons why the Tenth Circuit's antitrust ruling is correct, fact-specific, and unworthy of further review were fully set out in Natural's brief in opposition and the Solicitor General's *amicus* brief (in No. 89-1508) at that time. (The Tenth Circuit itself described the case as "unusual" and hardly "typical." 885 F.2d at 692, 694.) The explanations in those briefs need not be repeated here, and nothing has changed to alter the conclusion that review is unwarranted.

In particular, the pendency of *Spectrum Sports* in no way warrants reaching a different conclusion—or holding the present petition. *Spectrum Sports* involves the validity of the Ninth Circuit rule, first articulated in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), that permits an inference of a dangerous probability of successful monopolization from certain conduct and intent on the part of the defendant, without independent proof of relevant market

share. But in the present case, CIG never cited the *Lessig* rule in the court below or otherwise presented any argument or assertion seeking to uphold antitrust liability on the basis of any such rule. *See* CIG Brief on First Appeal at 56-62 (argument on dangerous probability). CIG is therefore not entitled to raise the issue in this Court.

In any event, the resolution of *Spectrum Sports* could not affect this case, because the question of *inferring* a dangerous probability of achieving monopoly power is simply not presented here. As explained above, this was a highly unusual case of attempted monopolization in which the facts left "no room for speculation about the probability that the Trailblazer System would gain a monopoly" (885 F.2d at 695): "because the full potential market impact of Natural's conduct had been achieved . . . [t]he question of probability of success had resolved itself into the question whether success had been achieved" (89-1508 U.S. Br. 16). Because there was no proof that the "System" had already achieved monopoly power, the Tenth Circuit concluded on these facts that "*from the beginning*, Natural's [conduct] presented no danger" that Natural could propel the "System" to a monopoly. 885 F.2d at 695. In such a case, the question of "inferring" a dangerous probability of success—the issue in *Lessig* and *Spectrum Sports*—cannot arise; indeed, even the Ninth Circuit does not permit such an inference where, as here, the court concludes that achievement of monopoly status is never possible. *See Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1335-36, *cert. denied*, 479 U.S. 851 (1986). Accordingly, no legitimate purpose would be served by holding the present petition for *Spectrum Sports*.

2. *The Post-Judgment Tort Award Question.* In its second question presented, CIG argues that the Tenth Circuit erroneously held that, when overlapping damages are awarded on two claims and liability on one of the claims is reversed on appeal, such a reversal "is no

justification for limiting common damages supported by a surviving claim." Pet. 15. CIG presents a host of arguments and authorities to challenge that alleged holding. *Id.* at 16-25. But there is a simple answer to CIG's elaborate effort to obtain review: CIG's entire argument is irrelevant to the present case, for the Tenth Circuit nowhere held what CIG accuses it of holding.

Quite simply, nothing whatever in the Tenth Circuit opinion denies that a plaintiff may have common damages affirmed on a surviving claim, or even that a plaintiff may obtain an "affirmance" on appeal of damages that the district court had explicitly subtracted from the original award on the surviving theory. All that the Tenth Circuit held is that the plaintiff cannot withhold its request for such an affirmance during the appeal and then make that request to the district court after the appeal has been decided and the case finally resolved, when there is no action left for the district court to take but the ministerial one of entering the corrected judgment as mandated. Nothing in that ruling threatens special verdict practice under Fed. R. Civ. P. 49(a) (*see* Pet. 18-20), requires unnecessary cross-appeals (*id.* at 20-21), alters the scope of "the mandate rule" (*id.* at 21-22), or diminishes the availability of relief from a judgment under Rule 60(b) (Pet. 23-25). And not a single decision cited by CIG (*id.* at 18-23) allows the plaintiff to make such a request for the first time in the district court after the appellate court has finally resolved the case and remanded for the ministerial act of entering final judgment.[13]

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[13] We note in particular that CIG's citation of *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), in urging the availability of relief under Rule 60(b) is plainly inapposite. *See* Pet. 24. *Standard Oil* did not address the substantive standards for relief under Rule 60(b), but merely the procedural question whether permission must be obtained from the court of appeals before the district court may consider a Rule 60(b) motion for relief from a judgment affirmed on appeal. CIG cites no case in conflict with the Tenth Circuit's

This case illustrates the correctness of the Tenth Circuit's ruling. Neither prior to the Tenth Circuit's 1989 decision, nor on rehearing, did CIG present to the court of appeals the readily available argument that the demand-charge damages should be affirmed as tort damages if antitrust liability were reversed.[14] CIG presented this argument only later, to the district court. If such litigation conduct were allowed, there would inevitably be multiple appeals, as there were here, because any substantive challenges to the "reinstated" damages—such as Natural's challenges in this case—would have to be reargued and then adjudicated in a second round of litigation in the district court and court of appeals. Allowing such conduct would also encourage parties in CIG's position regularly to delay resolution of the case and to pursue the tactical interest that CIG's litigation conduct in this case served: to raise the apparent stakes on

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ruling that a party may not use Rule 60(b) to raise an argument that, though fully available, it refrained from raising on appeal.

CIG also cites several decisions under Rule 60(b)(5), but in only one had the party seeking relief bypassed a prior appeal in the case, and the court of appeals in that case itself described its holding as "very narrow." *Werner v. Carbo*, 731 F.2d 204, 209 (4th Cir. 1984). There, all parties and the courts had agreed that a doctor and the doctor's "professional corporation" were to be treated identically with respect to liability. After the doctor's liability was reversed on appeal, the court of appeals held that the professional corporation should be relieved of liability as well, despite its technical failure to include itself in the doctor's appeal. In such an unusual circumstance, there was no potential for seeking tactical advantage and no prospect of multiple litigation to resolve issues not addressed in the initial appeal. *Werner* is not in conflict with the Tenth Circuit ruling here.

[14] CIG's petition itself effectively admits that CIG did not make such a request to the court of appeals. Thus, in arguing that the "mandate rule" and the "law of the case" doctrine cannot preclude its claim for the demand-charge damages, CIG necessarily asserts that the question of upholding such damages as part of the tort award upon reversal of antitrust liability was not presented to the Tenth Circuit on the 1989 appeal. Pet. 21-22.

the other theories of liability. *See* page 8, *supra*. The practice CIG followed in this case thus impairs the strong interests of the judicial system and other litigants in finality and the avoidance of piecemeal litigation.[15]

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[15] *See, e.g., Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.") (citation omitted); *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, No. 88-1388, slip op. 5 (4th Cir. Sept. 2, 1992); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) ("The district court is without jurisdiction to alter the mandate of this Court on the basis of matters included or includable in defendants' prior appeal.") (citing cases); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2851, at 142 (1973) ("Rule 60 is not a substitute for appeal.") (footnote omitted); *id.* § 2864, at 214 ("The broad power granted by [Rule 60(b)(6)] is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests.") (footnote citing *Ackermann v. United States*, 340 U.S. 193, 197 (1950), omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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